Supreme Court, U. S.
FILED
MAY 20 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6739

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093
Counsel for Appellant
Tel. (617) 384-3333

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement of the Case	4
The Questions are Substantial	4
Conclusion.	7
Appendix	
A -- Statutes Involved.	9
B -- Record of Municipal Court of Boston.	12
C -- Notice of Appeal	17

TABLE OF CASES

	Page
Barker v. Wingo, 33 LEd 2nd 101	7
Benton v. Maryland, 89 S.Ct. 2056	4
Callan v. Wilson, 127 U.S. 540	3, 4, 6
Cohens v. Virginia, 6 Wheat 264	3
Colten v. Kentucky, 326 LEd 2d 584	7
Duncan v. Louisiana, 391 U.S. 145	3, 4, 6
Holliday v. State, 109 R.I. 93	4, 7
Jones v. Robbins, 8 Gray 329	6
Kentucky v. Powers, 201 U.S. 1	3
Klopfer v. North Carolina, 386 U.S. 213	4
Largent v. Texas, 318 U.S. 418	3
Lemieux v. Robbins, 414 F2d 353	7
Mann v. Commonwealth, 271 NE 2d 331	2
Manns v. Commonwealth, 213 VA 322	6
Powell v. Texas, 392 U.S. 516	3
Thompson v. City of Louisville, 362 U.S. 199	3
United States v. Green, 355 U.S. 184	8
United States v. Jorn, 400 U S. 470	4, 8

TABLE OF CASES

	Page
United States v. Marion, 404 U.S. 307	7
Ward v. Village of Monroeville, 34 LEd 2nd 269	8
Williams v. Florida, 399 U.S. 78	7

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Appellant appeals from his conviction from the Municipal Court of the City of Boston, Massachusetts, entered on February 27, 1974 on a charge of unauthorized use of a motor vehicle, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

JURISDICTION

Appellant was convicted on February 27, 1974 in the Municipal Court of Boston and notice of appeal was filed in that court on May 16, 1974. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sec. 1257(2).

Appellant submits that the Municipal Court of the City of Boston is a "highest court" of Massachusetts within the meaning of the words in Sec. 1257. From a conviction in a criminal proceeding in a district court of Massachusetts, there is no direct appellate review, but only a trial de novo, or collateral relief, e.g. habeas corpus. Chief Justice Tauro recently summarized this principle in Mann v. Commonwealth, 271 NE 2d 331 (1971) at p. 333:

> "In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts. See G.L. C.250 Sec. 9. It is reasonable to conclude that the Legislature intended that, upon appeal, the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial.[3] 3. See Duncan v. Louisiana, 391 U.S. 145, ... We need not speculate whether convictions in the District Court resulted from error."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Cohens v. Virginia, 6 Wheat. 264, 375-6; Kentucky v. Powers, 301 U.S. 1, 37-39; Largent v. Texas, 318 U.S. 418, 422; Thompson v. City of Louisville, 362 U.S. 199, 202; Powell v. Texas, 392 U.S. 516, 517.

QUESTIONS PRESENTED

1. Are the States bound by the federal rule of Callan v. Wilson, 127 U.S. 540 guaranteeing defendants a trial by jury in the first instance when charged with an offense carrying a possible jail sentence in excess of six months?

2. Do state two-tier trial de novo procedures which deny a defendant a trial by jury in the first instance for a crime carrying a possible prison term in excess of six months impose an unconstitutional burden on the right to a speedy trial and violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws Ch. 263 Sec. 4, Ch. 218 Sec. 26, Ch. 278 Sec. 2, 18, and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the Appendix.

STATEMENT OF THE CASE

A complaint was issued against appellant for the unauthorized use of an automobile, a criminal offense under M.G.L. Ch. 90 Sec. 24(2)(a) carrying a possible two year jail sentence.[1] On February 27, 1974, appellant was tried on this charge in the Municipal Court of Boston. Appellant duly moved the trial court in writing for a trial by jury in the first instance, asserting that this right was guaranteed by the Sixth Amendment pursuant to Callan v. Wilson, 127 U.S. 540 and Duncan v. Louisiana, 381 U.S. 145. The trial court denied this motion. The government placed its case in evidence and rested. The appellant did not testify or present any witnesses or introduce any evidence. At the conclusion, the trial judge found appellant guilty. Appellant brings this appeal to vacate the conviction of the Municipal Court of Boston.

The federal questions underlying this appeal were raised by appellant at his trial in the Municipal Court of the City of Boston by his motion for a trial by jury. In this motion, he expressly claimed his right to a speedy trial by jury under the Sixth Amendment citing Callan v. Wilson, supra, Duncan v. Louisiana, supra, Klopfer v. North Carolina, 386 U.S. 213, and Holliday v. State, 280 A. 2d 333, and his rights under the double jeopardy clause of the Fifth Amendment citing Benton v. Maryland, 89 S. Ct. 2056, and United States v. Jorn, 400 U.S. 470.

The entire record of the "non-record" Municipal Court of Boston comprises the complaint setting out the charge; appellant's written motion for a speedy jury trial in which he specifically claimed his constitutional rights; the trial judge's written denial on the motion; and his written guilty finding noted on the complaint. A copy of the entire record is set forth in Appendix pp. 11-15.

[1] The relevant part of M.G.L. Ch. 90 Sec. 24(2)(a) is set out in the Appendix, p. 11.

THE QUESTIONS ARE SUBSTANTIAL

1. Massachusetts criminal procedure comprises a two-tier trial de novo system. Defendants, for the most part,[2] are charged initially upon a complaint in the non-record district court where they cannot obtain a trial by jury. Upon a conviction in the district court, a defendant cannot obtain any direct appellate review,[3] but has an automatic right to "appeal" his conviction for a trial de novo in the Superior Court where he may obtain a trial by jury.[4] If the defendant fails to prosecute his "appeal", the superior court may default him and impose sentence for the crime he was convicted of in the district court by a magistrate.[5]

[2] The district courts in Massachusetts have jurisdiction over all crimes having an authorized punishment up to five year imprisonment. See M.G.L. Ch. 218 Sec. 26 set out in the Appendix p. 10.

[3] Extraordinary writs and collateral relief invoking the Supreme Judicial Court's supervisory powers are available.

[4] See M.G.L. Ch. 278 Secs. 2 and 18 set out in the Appendix p. 10.

[5] See M.G.L. Ch. 278 Sec. 24 set out in the Appendix p. 10.

The Supreme Judicial Court of Massachusetts held in Jones v. Robbins, 8 Gray 329, 341 that Massachusetts' two-tier trial de novo system does not violate Article XII of the Declaration of Rights of the Massachusetts Constitution[6] guaranteeing that no law "shall subject any person to ... infamous punishment ...without trial by jury" which words Chief Justice Shaw stated were "equivalent" to the clause — "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" — in the Sixth Amendment.

In Callan v. Wilson, 127 U.S. 540, Justice Harlan took note of Jones v. Robbins at page 553-4 and rejected its reasoning at page 556-7 by holding that the Sixth Amendment guarantee to a trial by jury meant trial by jury in the first instance: "Except in that class or grade of offenses called petty offenses, ...the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged."

Duncan v. Louisiana, 391 U.S. 145, 149 bound the states to the Sixth Amendment and by dicta, the rule of Callan v. Wilson, supra. See Duncan at page 148 ftn. 30, 181, 182 ftn. 21, 213. The Rhode Island Supreme Court in Holliday v. State, 109 R.I. 93 (1971) has held unanimously that Duncan has bound the states to the rule of Callan v. Wilson. The Supreme Court of Virginia has held the contrary in Manns v. Commonwealth, 213 Va. 322. The issue is undecided among the two-tier trial de novo systems of other states.

[6]Article XII of the Declaration of Rights of the Massachusetts Constitution is set out in the Appendix p. 9.

See ftn. 9 and 10 in Colten v. Kentucky, 32 LEd. 2d 584, 592 (1972) citing Massachusetts, North Carolina, Pennsylvania. Cf. Lemieux v. Robbins, 414 F2d 353, 355 ftn. 3 (1969) noting the two-tier procedure in Maine. See also: D. Non-Jury Trial for Misdemeanors Subject to De Novo Review, Appendix to opinion of Justice Harlan, Williams v. Florida, 399 U.S. 78, 141.

2. The companion issue presented by this appeal is whether the imposition of a trial without jury is an unconstitutional burden on the defendant's right to a speedy trial by jury which he was unquestionably entitled to under the Sixth Amendment. The two-tier trial de novo procedure is totally counter-productive to minimizing the "anxiety and concern of the accused", Barker v. Wingo, 33 LEd 2nd 101, one of the main purposes of the speedy trial guarantee. For the defendant who chooses not to disclose his defense, a trial in the district court is a meaningless proceeding. A conviction and "appeal" from a district court trial generates a "cloud of anxiety, suspicion and often hostility", Barker v. Wingo, supra, and United States v. Marion, 404 U.S. 307, 321, and shifts the burden on the defendant to prosecute his "appeal" to prove his innocence, M.G.L. Ch. 278 Sec. 24. See Holliday v. State, supra, alternatively holding that two-tier trial de novo procedures violate the speedy trial provisions of the Sixth Amendment.

Similarly, the two-tier trial de novo system inherently violates the underpinnings of the double jeopardy provisions of the Fifth Amendment — "/T/he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alledged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though

innocent he may be found guilty", United States v. Green, 355 U.S. 184, 187-188.

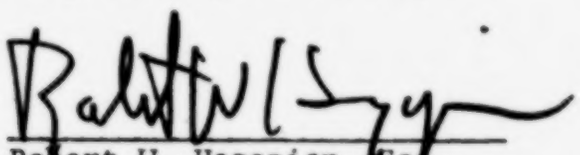
Implicit in limiting "the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", United States v. Jorn, 400 U.S. 470, is limiting it to a single proceeding which comports with constitutional standards, and it is no answer on the part of States to eventually offer the defendant a constitutional de novo adjudication, Ward v. Village of Monroeville, 34 LEd 2nd 269, 272 (1972).

Since the above issues effect the administration of criminal justice in at least ten states, and since there is a conflict between the decisions of the highest court of at least two of these states, it is submitted that the questions presented by this appeal are substantial and of public importance.

CONCLUSION

Appellant maintains that the Municipal Court of the City of Boston erred in denying him a trial by jury. He believes that such a denial violated his Sixth Amendment right to a trial by jury and to a speedy trial. It is submitted that the questions presented by this appeal are so substantial to require plenary consideration for their resolution.

Respectfully submitted,



Robert W. Hagopian, Esq.
Counsel for Appellant

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgement of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

The relevant portion of M.G.L. Ch. 218 Sec. 26 reads:

> District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective districts or otherwise made punishable therein; all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in ... .

The relevant portion of M.G.L. Ch. 278 Sec. 18 reads:

> Whoever is convicted of a crime before a district court may appeal to the superior court, and at the time of conviction shall be notified of his right to take such appeal.

M.G.L. Ch. 278 Sec. 2 reads:

> Issues of fact joined upon an indictment or complaint shall, in the superior court be tried by a jury drawn and returned in the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

M.G.L. Ch 278 Sec. 24 reads:

> If the appellant fails to enter and prosecute his appeal he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and if he is not them in custo-

> dy, may issue process to bring him into court to receive sentence.

The relevant portion of M.G.L. Ch. 90 Sec. 24(2)(a) reads:

> Whoever ..... and whomever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, ...

TO THE JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said City of Boston for the transaction of criminal business, within the County of Suffolk,

Richard Tracy

of the City of Boston, in the County of Suffolk, in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that

Steven Costarelli

of said City of Boston, on the twenty seventh day of November in the year of our Lord one thousand nine hundred and seventy three at the City of Boston aforesaid, and within the judicial district of said Court, upon a certain public way there situate called Albany street, (Emergency Parking Lot of the Boston City Hospital) did then and there use a certain motor-vehicle, to wit, an automobile the property of

Leroy Taylor

, the said Costarelli then and there well knowing such use of said automobile by him said Costarelli to be unauthorized

BEST COPY AVAILABLE

SUFFOLK, ss BOSTON MUNICIPAL COURT

CRIMINAL #_____

unauthorized use Ch. 90 Sec 24

trial date Feb. 6, 1974

COMMONWEALTH OF MASSACHUSETTS

vs.

STEPHEN ~~COSTENELLO~~ Costarelli RWH

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, ___ U.S. _____, Holliday v. State, 280 A.2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89S. Ct. 2056, U.S. v. Jorn, 400 U.S. 470.

By his attorney,

493

.197 4

COMMONWEALTH

ON COMPLAINT OF
Richard Tracy

vs.
Steven Costarelli

UNAUTHORIZED USE OF AUTOMOBILE

Gen. Laws Chap. 90 Sec. 24
30 days
$50-$500 or 2-Months-2 years or both
JAN 23 1974

PLEAD NOT GUILTY
100 to Feb. 6. Emg
Eleanor
FEB 1974
motion for jury trial
100 Feb 27 at Billerica
MAIL'S COPIES TO D. A. [illegible]
ON DEF. - 20-[illegible] - TO [illegible]
ON Feb. 27
Sacco FEB 14 1974 Walsh [illegible]
[illegible]

CARDED JAN 23 1974

[illegible] FEB 27 74

FEB 27 1974 Justin Llmud

FEB 6 3 38 PM '74

BEST COPY AVAILABLE

FEB 27 1974

FOUND GUILTY

HOUSE OF CORRECTION

APPEAL $ 100

1st MONDAY OF

BEST COPY AVAILABLE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

MUNICIPAL COURT OF
THE CITY OF BOSTON
CRIMINAL 4 3

COMMONWEALTH OF MASSACHUSETTS

vs.

STEVEN COSTARELLI

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Steven Costarelli, the appellant above named hereby appeals to the Supreme Court of the United States from the conviction of the Municipal Court of the City of Boston on February 27, 1974. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies that he has served a copy of the above Notice of Appeal on Arthur Murphy, Boston Police Prosecutor, by mailing a copy of same first class, postage prepaid, Boston Police

Supreme Court, U. S.
FILED
SEP 25 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6739

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

AMENDMENT TO JURISDICTIONAL STATEMENT

Robert W. Hagopian, Esq.
Wrentham, Mass. 02093
Counsel for Appellant
Tel. 617-384-3333

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6739

STEVEN COSTARELLI, Appellant

vs.

COMMONWEALTH OF MASSACHUSETTS, Appellee

ON APPEAL FROM THE MUNICIPAL COURT OF
THE CITY OF BOSTON

AMENDMENT TO JURISDICTIONAL STATEMENT

Now comes the appellant and moves this Court for leave to file an amendment to his jurisdictional statement.

Introduction

On September 4, 1974, the Supreme Judicial Court of Massachusetts handed down its opinion in Whitmarsh v. Commonwealth, No. 15,354. Appellant submits that this decision conclusively settles the fact that this Court has jurisdiction over his appeal pursuant to 28 U.S.C. Sec. 1257(b).

Argument

In Whitmarsh v. Commonwealth, supra, the Supreme Judicial Court refused to review the constitutionality of Whit-

marsh's conviction in a district court[1] of Massachusetts in which Whitmarsh was denied a trial by jury upon a charge carrying a possible maximum jail sentence of two years. The court refused to accept discretionary jurisdiction under M.G.L. Ch. 211 Sec. 3 which grants to the Supreme Judicial Court "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided."[2] The Court further held that a trial de novo was the remedy "expressly provided" and hence it lacked jurisdiction over Whitmarsh's appeal.

In Mann v. Commonwealth, 271 NE 2d 331 (1971), 333, the Supreme Judicial Court

---

[1] A district court is equivalent to the Municipal Court of Boston in Massachusetts' two-tier trial system.

[2] M.G.L. Ch. 211 Sec. 3 as amended by Ch. 1114 of the Acts of 1974 reads in part:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

made it clear that there was no procedure for direct appellate review of a district court trial – "In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the district courts." The appellee also concedes this point on p.4 of his brief – "...the judgment [of a district court] is not subject to further review...". In Whitmarsh v. Commonwealth, supra, the Supreme Judicial Court declared that it did not have jurisdiction for discretionary review over a conviction in a district court. Accordingly, appellant submits that the district court of Massachusetts is a "highest state court" within the meaning of these words in Section 1257(b).

Lastly, it should be observed that the appellee suggests that a district court of Massachusetts is not a "highest state court" because a defendant has a right to appeal by trial de novo to the Superior Court. The short answer to this is that a trial de novo is not a method of direct review. It is a new trial. Similarly, while it is true that a defendant may raise his double jeopardy claim by a motion to dismiss in the Superior Court as the Supreme Judicial Court suggests in the Whitmarsh case, this procedure is a collateral remedy and, as such, is immaterial to the issue of this Court's jurisdiction under Sec. 1257(b).

Respectfully submitted,

Robert W. Hagopian, Esq.

73-6739

S-15,354 SJC

WALTER E. WHITMARSH vs. COMMONWEALTH.

QUIRICO, J. On September 6, 1973, the plaintiff in the present case was tried in a District Court on a complaint charging him with the misdemeanor of operating a motor vehicle while under the influence of intoxicating liquor. G. L. c. 90, § 24 (1) (a), as amended through St. 1971, c. 1071, § 4. Before the trial started he filed a written motion for a trial by jury which was denied. After a trial before a judge of the District Court, at which he rested, without presenting any evidence, upon completion of the Commonwealth's case, he was found guilty and fined $100. He appealed therefrom to the Superior Court (G. L. c. 278, § 18), requesting the court to note that the appeal "was not to be considered a waiver of his demand for a trial by jury and was being made only to preserve that right procedurally." The appeal was entered in the Superior Court on September 10, 1973, and it has not been tried.

On September 18, 1973, the plaintiff filed a document entitled "INTERLOCUTORY APPEAL" with the clerk of this

court for Suffolk County alleging the facts stated above and asking that the court declare that the "Massachusetts two-trial de novo procedure . . . [violates] Article XII of the Massachusetts Constitution and the Fifth, Sixth, and Fourteenth Amendment[s] of the United States Constitution," and that it "enjoin the Commonwealth from further prosecuting the complaint initiated in the District Court."[1] The latter request was denied by the single justice on November 8, 1973, and the plaintiff excepted thereto. On December 10, 1973, the Commonwealth filed an answer admitting all of the facts alleged in the plaintiff's petition. On January 11, 1974, a single justice of this court, acting at the request of the parties, reserved and reported the case without decision to the full court for its determination on the pleadings.

---

[1] On September 20, 1973, the plaintiff filed a motion in the Superior Court requesting that the complaint which was the subject of the appeal be dismissed. An examination of the docket entries in that appeal indicates that the motion had not been acted on up to the date of argument before the full court in the present case.

Questions of Procedure and Standing.

We are confronted at the outset with several serious questions concerning the procedure by which the plaintiff seeks to raise the important issue of the constitutionality of this Commonwealth's two-tier court system and his standing to do so in the particular circumstances of this case.

1. Purported Interlocutory Appeal. Despite the plaintiff's designation of his petition as an "INTERLOCUTORY APPEAL," it is not such in fact or in law. The only interlocutory appeal available to a defendant in a criminal case in this Commonwealth is that provided by G. L. c. 278, § 28E, inserted by St. 1967, c. 898, § 1. That statute permits a defendant "in a felony case" to make application to the Chief Justice or to a single justice of this court for leave to take "an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial." This case does not come within the quoted statutory language, first, because it involves a misdemeanor and not a felony, and, second, because there has been no "decision, order or judgment of the superior court" on a "motion to suppress evidence."

2. Relief under G. L. c. 211, § 3. The first paragraph of the plaintiff's petition states that the jurisdiction of this court is invoked pursuant to G. L. c. 211, § 3 (as amended by St. 1956, c. 707, § 1),[2] which provides in part that this court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided" (emphasis supplied). We have indicated in a number of decisions that our power under this statute should be used sparingly, and that it should rarely be used in a case where some other practical remedy is available. In Barron v. Barronian, 275 Mass. 77, 80 (1931), we characterized a request for relief under this statute as a request "for extraordinary intervention." In Gilday v. Commonwealth, Mass. (1971),[a] we said: "Only in the most exceptional circumstances will we review interlocutory rulings in criminal cases under our general superintendence powers," and we there exercised the power to avoid an error which "might be irremediable, and possibly not curable even by a new trial since the defendants could not thereafter be placed in statu quo." Id. at [b]

---

[2] See St. 1973, c. 1114, § 44, effective July 1, 1974, amending § 3 as part of a statutory revision to conform the General Laws to the new Massachusetts Rules of Civil Procedure, also effective July 1, 1974.

[a] Mass. Adv. Sh. (1971) 1349.

[b] Id. at 1350.

In Myers v. Commonwealth, Mass. , (1973),[c] and in Corey v. Commonwealth, Mass. , (1973),[d] we repeated the language quoted above from the Gilday case and then exercised our extraordinary power under § 3 to insure the proper conduct of probable cause hearings in the District Courts on complaints against Myers and Corey before they could be prosecuted in the Superior Court.

A comparison of the facts of the present case with those of the very few cases in which we have exercised our extraordinary powers under G. L. c. 211, § 3, to give relief with respect to interlocutory rulings in criminal cases leads us to conclude that this is not an instance where such relief should be granted.

(a) This is not a case where "no other remedy is expressly provided." The constitutional issue the plaintiff now asks us to decide is the same issue which he raised in the District Court, and in the Superior Court by his motion to dismiss.[3] If his motion were denied, and if he were thereafter tried in the Superior Court and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto. The single justice properly

---

[c] Mass. Adv. Sh. (1973) 1045, 1046.

[d] Mass. Adv. Sh. (1973) 1237, 1238.

[3] See fn. 1, supra.

refused to stay proceedings in the Superior Court for the purpose of enabling the plaintiff to argue before the full court that he had no other remedy. The fact that the plaintiff's constitutional claims could be rendered moot if he were acquitted in the Superior Court would not, in our opinion, prejudice him in such a manner as to warrant the exercise of our "extraordinary" powers of review under G. L. c. 211, § 3. Barber v. Commonwealth, 353 Mass. 236, 239 (1967).

(b) In challenging the two-tier court system, one of the plaintiff's principal arguments is that it denies him the right to a speedy trial in violation of the Sixth Amendment to the United States Constitution. He appears to argue that this right is violated both by the requirement for an initial nonjury trial to a judge in the District Court and by the fact that even apart from the District Court proceeding "the time schedule in the Superior Court for [jury] trial of misdemeanors and less serious felonies is deplorable." The circumstances of this case suggest, however, that the plaintiff is in no position to raise this speedy trial claim. The plaintiff was tried in the District Court on September 6, 1973, within fifteen days after his arrest. His appeal taken on that date

was entered in the Superior Court on September 10, 1973. The plaintiff then elected to proceed before the single justice of this court rather than to let his appeal take its course in the Superior Court. When that appeal was reached for trial in the Superior Court on November 15, 1973, he requested that the case not be tried because of his petition pending before the single justice, and when the case was reached again in the Superior Court on March 6, 1974, he did not appear and was defaulted. He has never taken any action in the Superior Court to assert his right to speedy trial. The plaintiff's conduct at all stages of the proceedings indicates that either he or his counsel, or both, have adopted the strategy of delaying a jury trial in favor of their attempts to obtain an interlocutory ruling on the constitutional question they seek to test.

3. Motion to Dismiss Petition. When this case was reached for argument before the full court, the Commonwealth offered and argued a motion that the plaintiff's petition be dismissed because of his failure to appear in the Superior Court when his case was called for trial on his appeal on March 6, 1974, and his resulting default which continued at the time of the argument. As noted above, on filing the present petition the plaintiff had requested a stay of further proceedings on the

complaint against him and the stay was denied. He was therefore required to appear for trial of his appeal when it was called in the Superior Court on March 6, 1974. The filing and pendency of his petition in the present case did not relieve him from the obligation to appear. It is not within his power to decide unilaterally that he will prosecute this civil action and, while doing so, fail, neglect or refuse to appear for trial in the Superior Court when required to do so. Under the terms of G. L. c. 278, § 18, on taking his appeal to the Superior Court he was released on personal recognizance "with condition to appear at the superior court on said return day [of the appeal] and at any subsequent time to which the case may be continued . . . and so from time to time until the final sentence, order or decree." He has violated that obligation and he is therefore not entitled to the review of interlocutory questions he now seeks. "By his voluntary act, which renders him unavailable to await the decision of the court, he has waived appellate rights." Commonwealth v. Rezendes, 353 Mass. 228 (1967). Commonwealth v. Richards, 1 Mass. App. Ct. (1973).[e]

4. Conclusion. On the basis of our discussion above we conclude as follows: (a) that the petition in this case cannot be maintained as an application for an interlocutory appeal, (b) that it cannot be maintained as a petition for the exercise

---

[e] Mass. App. Ct. Adv. Sh. (1973) 390.

of this court's extraordinary powers under G. L. c. 211, § 3, and (c) that by reason of his failure to appear for trial when his case was called in the Superior Court the plaintiff is not entitled to any appellate relief from this court even if such relief were otherwise available to him.

The Plaintiff's Constitutional Claims.

Although for reasons already discussed the plaintiff is not entitled to relief in this case, we think that in view of the nature of the question which he attempted to raise and in view of the fact that the plaintiff's counsel appears determined to raise the same question in other cases,[4] we

---

[4] The following are several other cases in which the plaintiff's counsel has raised substantially the same constitutional question which he is raising in the present case:

(1) Scheller v. Burke, Civil Action No. 73-428-G (D. Mass.), affirmed on January 3, 1974, by the United States Court of Appeals (1st Cir.) No. 73-1296.

(2) Corcoran v. Hedges, Civil Action No. 73-91-M (D. Mass.); appealed to the United States Court of Appeals (1st Cir.) No. 73-8074, and decided on January 4, 1974, by the following MEMORANDUM AND ORDER:

> "Present counsel, representing various clients, seems determined to find a way to attack the Massachusetts so-called two tier system of criminal trials in the federal court without having to do so first in the state court. We decline to speculate on the anticipated advantages, if any, but we repeat that we are totally unsympathetic in the absence of convincing reasons.
>
> "Absent undue delay the federal courts will not step in where procedures, available in the state court to raise the issues presented, are not pursued. Our ears are particularly closed when a party allegedly desiring speed, seeks it expeditiously in one area and not in another.

ought, as was done in Wellesley College v. Attorney Gen. 313 Mass. 722, 731 (1943), to express briefly our opinion upon the constitutional question that has been argued. Simeone Stone Corp. v. Board of Appeals of Bourne, 345 Mass. 188, 192 (1962). Harvard v. Maxant, Mass. , (1971).[f] Karchmar v. Worcester, Mass. , (1973).[g]

1. Sixth Amendment Claims. The plaintiff argues that our two-tier court system, under which he was first placed on trial before a District Court judge and then required to appeal to the Superior Court if he desired a trial de novo before a jury, violates the trial by jury and speedy trial provisions of the Sixth Amendment.[5] We have concluded above that on the facts of this case the plaintiff's argument relating to his right to a speedy trial is without merit and

---

> "The request for a certificate of probable cause is denied."

(3) Almeida v. Lucey, 372 F. Supp. 109, 111 (D. Mass. three-judge court, 1974), app. pending.

(4) Whitmarsh v. Commonwealth, No. 73-183 (Equity), Supreme Judicial Court for the county of Suffolk.

(5) Costarelli v. Buckley, No. 74-168 (Law), Supreme Judicial Court for the county of Suffolk.

[f] Mass. Adv. Sh. (1971) 1601, 1605.

[g] Mass. Adv. Sh. (1973) 1223, 1234-1235.

[5] The pertinent language of the Sixth Amendment is: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

we will not discuss the claim further here. See Barker v. Wingo, 407 U. S. 514, 530-533 (1972).[6] What must still be considered is whether, as the plaintiff asserts, the two-tier court system violates a right of an accused purportedly guaranteed by the Sixth Amendment to have a jury trial "in the first instance." It is this assertion which is at the core of the plaintiff's constitutional challenge to that system.

This court has not heretofore considered the question whether our two-tier court system in and of itself violates the jury trial requirement of the Sixth Amendment[7] but it has considered the question in relation to the similar requirement included in art. 12 of the Declaration of Rights of the Massachusetts Constitution: "And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and the navy, without trial by jury."[8]

---

[6] The Supreme Court identified in that case several factors which courts should assess or weigh when considering a claim of denial of the right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. at 530. In the circumstances of the case before us it is clear that none of these factors can or should be weighed in favor of the plaintiff.

[7] In Mann v. Commonwealth, 359 Mass. 661, 667 (1971) (Mass. Adv. Sh. [1971] 1027, 1032-1033), we briefly considered the more limited question whether "the imposition of a greater sentence after a de novo trial unconstitutionally burdens . . . [a criminal defendant's] right to a jury trial," but there is no indication in the case whether Mann's contention that it did so was based on the Sixth Amendment or on art. 12 of the Massachusetts Declaration of Rights.

[8] The full text of that part of art. 12 relevant to this case reads as follows: "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his

In Jones v. Robbins, 8 Gray 329 (1857), in which the principal question involved was whether a person could be sentenced to State prison without a grand jury indictment, the court said: "The last clause [of art. 12], which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a 'capital' or 'infamous punishment,' . . . is somewhat more explicit than the preceding clause, 'judgment of his peers,' and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains

---

life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court . . .. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury." Id. at 341-342. In the more than 100 years since Jones v. Robbins was decided, we have never questioned this conclusion. See Mann v. Commonwealth, Mass. , - (1971);[h] Commonwealth v. Britt, Mass. , (1972).[i]

The plaintiff concedes that this court has considered, and continues to consider, the two-tier court system as satisfying the applicable constitutional requirements of art. 12 of the Declaration of Rights. He argues, however, that the Sixth Amendment has traditionally been held to secure a criminal defendant in the Federal courts, other than one charged with a "petty offence," the right to a jury trial "from the first moment, and in whatever court, he is put on trial for the offence charged," Callan v. Wilson, 127 U. S. 540, 557 (1888), and that whatever the Sixth Amendment requires by way of a jury trial in the Federal system is now made applicable to the States through the Fourteenth Amendment.

---

[h] Mass. Adv. Sh. (1971) 1027, 1032-1033.

[i] Mass. Adv. Sh. (1972) 1443, 1447.

In Callan v. Wilson, supra, involving a criminal prosecution in the District of Columbia, the court said at p. 557: "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name [of], or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution"(emphasis supplied). It is clear from the italicized language that this decision, when rendered, was intended to apply only to Federal prosecutions and not to State prosecutions. In reaching its decision the court noted the contrary language in Jones v. Robbins, 8 Gray 329, 341 (1857), but elected not to follow it, an action which did not affect the validity of this court's interpretation of the Massachusetts Constitution in the Jones case.

As the plaintiff points out, however, in Duncan v. Louisiana, 391 U. S. 145, 149 (1968), the Supreme Court held that the due process clause of the Fourteenth Amendment made applicable to the States the jury trial provision of the Sixth Amendment: "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." Yet an examination of the concurring and dissenting opinions in that case indicates that the question immediately arising among the Justices was whether the court's holding meant or should mean that all prior decisions of the Federal Courts interpreting the jury trial provision of the Sixth Amendment would be applicable in all respects and details to the States as well, a question to which the opinion of the court, written by Mr. Justice White, had given an ambiguous response in a footnote.[9]

---

[9] 391 U. S. at 158-159, fn. 30, which states in pertinent part: "Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, Thompson v. Utah, 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, Maxwell v. Dow, 176 U. S. 581, 586 (1900); and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by de novo trial with a jury, Callan v. Wilson, 127 U. S. 540, 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court" (emphasis supplied).

Thus, Mr. Justice Black, with whom Mr. Justice Douglas joined, wrote in his concurring opinion: "The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also

guaranteed by the Fourteenth Amendment to defendants tried in state courts. . . . I am very happy to support this selective process through which our Court has . . . held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government." Id. at 162-164. On the other hand, Mr. Justice Fortas, in his concurring opinion, expressed an opposing point of view: "But although I agree with the decision of the Court, I cannot agree with the implication, see . . . [391 U. S.] at 158-159, n. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental — that they are not essential to due process of law — and that they are not obligatory on the States. . . .

There is no reason whatever for us to conclude that . . . we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. . . . The Due Process Clause . . . does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States." Id. at 213-214.[10] Mr. Justice Harlan, with whom Mr. Justice Stewart joined, wrote a dissenting opinion in which he stated: "[The Court] holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases — including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts." Id. at 172. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored." Id. at 181.

There are numerous later statements by various Justices of the Supreme Court in a series of concurring and dissenting opinions on the question whether all Sixth Amendment Federal jury requirements are or are not, or should or should not be, applicable in their entirety to State criminal trials.

---

[10] Mr. Justice Fortas's concurring opinion also applied to Bloom v. Illinois, 391 U. S. 194 (1968), and actually follows the court's opinion in that case.

See Bloom v. Illinois, 391 U. S. 194, 211, 213-214, 215 (1968); Baldwin v. New York, 399 U. S. 66, 74, 76-77 (1970); Williams v. Florida, 399 U. S. 78, 86, 102-103, 106, 122-123, 130-133, 136-138, 143 (1970); Johnson v. Louisiana, 406 U. S. 356, 369, 375, 388, 395-396 (1972); Apodaca v. Oregon, 406 U. S. 404, 406, 410-411, 414-415 (1972). See also Codispoti v. Pennsylvania, U. S. , , (Rehnquist, J., dissenting) (1974).[j] However, no useful purpose would be served by any tabulation of the position which each of the Justices took in any or all of the cases in which this subject was discussed. A reading of all the cases suggests to us that the meaning of the Sixth Amendment's jury trial provision — and perhaps also the specific instances of its application to the States — continues to be in flux. In both Williams v. Florida, supra, and Apodaca v. Oregon, supra, for example, the Supreme Court rejected what had been traditional interpretations of the Sixth Amendment jury trial provision in the Federal Courts by holding that that clause did not require as a constitutional matter in State or Federal Courts either a twelve person jury or a unanimous verdict of guilty in certain serious criminal cases. In doing so the court in effect reversed several of its prior cases. See, e.g., Thompson v. Utah, 170 U. S. 343 (1898); Maxwell v. Dow,

[j] (June 26, 1974) 42 U. S. L. Week 5175, 5177, 5189.

176 U. S. 581, 586 (1900); Andres v. United States, 333 U. S. 740, 748-749 (1948). Cf. Duncan v. Louisiana, supra, at 158-159, n. 30, set forth in fn. 9 above.

It is clear that the Supreme Court is aware of the existence in several States of two-tier court systems such as we have in Massachusetts for the trial of less serious criminal offences, as the cited footnote from the Duncan case indicates. See Williams v. Florida, 399 U. S. 78, 137, 139, 141-143 (Harlan J., concurring in result) (1970); Colten v. Kentucky, 407 U. S. 104, 113-114 (1972). Indeed, in the Colten case, id. at 112-120, the court examined such systems at some length, setting forth the justifications for them offered by the States (id. at 114), and discussing what apparently was its own view of their advantages (id. at 118-119).[11] In light of these cases and of the highly

[11] "We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy . . .. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. . . . The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence

uncertain state of the law on the subject, we do not believe that we are required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance for all criminal offences, Callan v. Wilson, 127 U. S. 540 (1888), [12] or (b) that even if that court did reaffirm this rule of the Callan case with respect to the Federal Courts, it would apply such a requirement in equal fashion to the States. In sum, we believe that the Commonwealth's two-tier court system satisfies the jury trial requirement of the Sixth Amendment as applied to the States through the Fourteenth Amendment.[13]

---

imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial de novo system, as such, is unconstitutional."

[12] We note that although this holding of Callan v. Wilson, supra, has been cited by the Supreme Court in a few of the opinions discussed above, the court has not indicated any opinion, either affirmative or negative, about it. See Duncan v. Louisiana, supra, at 158-159, fn. 30; Williams v. Florida, 399 U. S. 78, 137 (1970) (Harlan, J., concurring in judgment).

[13] See Almeida v. Lucey, 372 F. Supp. 109, 111, 112-113 (Tauro, J. dissenting) (D. Mass. three-judge court, 1974), app. pending.

We are aware that in State v. Holliday, 109 R. I. 93, 103-104 (1971), the Supreme Court of Rhode Island reached the opposite conclusion from ours, but for the reasons discussed above we do not agree with that court's opinion. Cf. Manns v. Koontz, 451 F. 2d 1344, 1345 (4th Cir. 1971); Manns v. Commonwealth, Va. (1972) (191 S. E. 2d 810 [1972]). See Lombleux v. Robbins, 414 F. 2d 353, 355-356 (1st Cir. 1969), cert. den. 397 U. S. 1017 (1970).

2. Fifth Amendment Claim. The plaintiff also contends that the two-tier court system violates the double jeopardy clause of the Fifth Amendment, made applicable to the States through the Fourteenth. Benton v. Maryland, 395 U. S. 784 (1969). The principal thrust of his argument relates to the possible imposition of a higher sentence by the Superior Court in a de novo trial held on an appeal from the District Court: he claims first that this "threat of enhanced penalty" in the Superior Court "chills" a defendant's right to take an appeal, and, second, that the mere existence of authority in the Superior Court judge to impose a greater sentence in itself constitutes a violation of the double jeopardy clause.

The plaintiff's argument is not new to this court. In Mann v. Commonwealth, 359 Mass. 661 (1971),[k] the same contentions of "chilling effect" (which is essentially a claim of denial of due process more than of violation of the double jeopardy clause) and enhanced penalty were raised and were resolved against the plaintiff's contention. Id. at - , - .[l]

---

[k] Mass. Adv. Sh. (1971) 1027.

[l] Id. at 1028-1030, 1031-1033.

See Lemieux v. Robbins, 414 F. 2d 353, 354-356 (1st Cir. 1969), cert. den. 397 U. S. 1017 (1970) (Maine two-tier court system).[14] The plaintiff suggests these decisions should not control here because both courts incorrectly relied on North Carolina v. Pearce, 395 U. S. 711 (1969), with respect to the double jeopardy claims raised in the cases before them; it is the plaintiff's position that the Pearce case, which involved the resentencing of a defendant who had perfected a successful appeal and had been retried and ultimately reconvicted, is entirely distinguishable from the case at bar. We believe, however, that Colten v. Kentucky, 407 U. S. 104 (1972), has rejected that position.

---

[14] As we said in the Mann case, Mass. at , (1971) (Mass. Adv. Sh. [1971] 1028-1029, 1030): "The petitioner complains that the [two-tier de novo] procedure has a chilling effect on his right of appeal. 'In answering this question we must have in mind that a defendant gives up nothing by going to trial in the district court. . . . Looking at the total circumstances, where the state offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of. . . . The state's two step procedure has a legitimate purpose.' Lemieux v. Robbins, . . . [supra, at] 355-356. . . . [T]he reasoning in the Lemieux case is applicable to the instant case. A defendant not only 'gives up nothing by going to trial in the district court' but he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own. If he is found guilty he can appeal. If he is found not guilty that is the end of the case because 'double jeopardy' precludes an appeal by the State."

In the Colten case the defendant was tried, convicted and fined for disorderly conduct before an inferior court without a jury pursuant to the Kentucky two-tier court system for less serious criminal offences. He exercised his right to "appeal" to a higher court for a trial de novo before a jury, at which trial he was again convicted and a higher fine was imposed. Like the plaintiff in the case before us, he argued that the State two-tier court system was constitutionally "infirm" because of the judge's power to impose a higher sentence in the second-tier trial, basing his argument in part on the Fifth Amendment's double jeopardy clause. The Supreme Court briefly disposed of his claim: "Colten's alternative contention is that the double jeopardy clause prohibits the imposition of an enhanced penalty upon reconviction. The Pearce Court rejected the same contention in the context of that case, 395 U. S., at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in Pearce, where reversal of the first conviction was for constitutional error." 407 U. S. at 119.

Despite the plaintiff's assertions to the contrary, it seems clear that the Colten case is indistinguishable from the case before us and that its rejection of the double jeopardy claim governs here.

Disposition.

In accordance with the conclusion reached in par. 4 of the first section of this opinion, an order is to be entered by the single justice dismissing this petition.

So ordered.